BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TRACY L. MOORE[1]	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	Docket No. 1,064,992
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), by and through Jeffery Brewer of Wichita, requested review of Administrative Law Judge Gary Jones' July 7, 2014 Award. Joseph Seiwert of Wichita appeared for the claimant. The Board heard oral argument on October 22, 2014.

RECORD AND STIPULATIONS

The Board considers the record and adopts the stipulations in the Award. At oral argument, the parties agreed claimant has a 66.67% task loss. Respondent also conceded claimant is currently not capable of earning 90% or more of her pre-injury average weekly wage.

ISSUES

This work disability case concerns claimant's December 25, 2012 accidental injury. The judge found claimant suffered a 68% wage loss by averaging vocational consultant Doug Lindahl's opinion that claimant had a 36% loss of earning capacity with claimant's demonstrated 100% wage loss. After averaging the task loss and wage loss percentages, the judge awarded claimant a 67% work disability.

Respondent requests reversal, arguing the judge's method to determine wage loss was in error, claimant's post-injury wage earning capability results in only a 36% wage loss, and claimant's work disability should be 51.5%. Claimant requests the Award be modified, arguing she has a 100% wage loss, based on her demonstrated inability to find post-injury employment, and when combined with a 66.67% task loss, yields a work disability of 83.34%. Alternatively, claimant maintains the Award should be affirmed.

The only issue for Board review is the nature and extent of claimant's disability.

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[1] Division records show claimant's name changed to "Tracy L. Moore Turner" at some point in 2014.

FINDINGS OF FACT

Claimant, who is currently 30 years old, began working for respondent – the Kansas Veterans Home – as a certified nurse's aide in August 2011.

On December 25, 2012, claimant began experiencing severe low back pain while lifting residents. She initially thought she had a strain and asked for Tylenol from the Med Aide. By the end of her shift, claimant advised the Med Aide the medication was not working and went home. Sometime during the night, the pain started radiating into her legs. Upon waking the next morning, she was unable to walk. She contacted her primary care physician, who suggested she see a chiropractor. That same day, claimant was seen by a chiropractor. She was then referred to Via Christi Occupational Medicine, followed by B. Theo Mellion, M.D., a neurosurgeon. Dr. Mellion recommended surgery, but claimant opted to proceed with physical therapy and medications.

A preliminary hearing was held on September 26, 2013, and an Order issued appointing David Hufford, M.D., who is board certified in family practice and as an independent medical examiner, to perform an independent medical examination (IME).

Claimant was seen by Dr. Hufford on November 5, 2013. Claimant complained of continued pain in her thoracic and lumbar spine and radiation of the low back pain to the level of the feet with intermittent paresthesias. Physical examination revealed asymmetry of her knee reflexes, positive straight leg raises and asymmetry of the thigh musculature. Dr. Hufford noted a lumbar MRI report and diagnosed claimant with a left eccentric L5-S1 disc herniation. Because claimant declined possible surgery, Dr. Hufford recommended medications, injections and disc decompression. Dr. Hufford also believed claimant using a TENS unit may be beneficial. Dr. Hufford assigned a 10% whole person impairment based on Lumbosacral DRE Category III of the 4th Edition of the AMA *Guides.* Dr. Hufford imposed restrictions of frequent lifting of 10 pounds and occasional lifting up to 20 pounds.

On December 31, 2013, claimant was terminated by respondent due to her inability to return to her position within one year. Her employer-provided fringe benefits ceased on such date.

Claimant returned to Dr. Hufford on January 6, February 3, and March 4, 2014. Dr. Hufford noted claimant's low back and left leg remained unchanged since the IME. Dr. Hufford recommended continued palliative care – disc decompressive therapy, use of a TENS unit and prescriptions. He noted unless claimant undergoes surgical intervention, she will require maintenance of a "steady state level."[2]

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[2] Hufford Depo., Ex. 2 at 1.

At the April 30, 2014 regular hearing, claimant testified that every Saturday, she takes an eight hour college course in Health Hospital Service Management. She testified she had an A+ GPA and planned to earn her degree in June 2014. Claimant indicated the college offered job placement assistance and the positions she would qualify for after graduation paid between $30,000 and $50,000 annually. According to claimant, there are positions available in her geographical area that are within Dr. Hufford's restrictions.

After being terminated, claimant sought employment by looking for work at least three times per week, but she remained unemployed. One of her employment opportunities was as an insurance company sales representative, but it required travel and she is only able to sit 15-30 minutes before having to change positions. Additionally, her medications interfere with her ability to drive.

Claimant testified her back locks up every two to three months, causing her to be unable to move or bend until seen by a physical therapist. As a result, she had to purchase a front loading washer and dryer so she does not have to bend over. She no longer engages in prior hobbies of jet skiing, horseback riding, dirt track racing and camping due to the difficulty with extended sitting. She acknowledged still fishing, but is only able to do so for about 15-30 minutes before having to stop.

Dr. Hufford testified on May 8, 2014. Dr. Hufford testified asymmetry in the symptomatic leg and diminished reflexes indicate improper nervous system functioning. He testified the positive straight leg raising test was an objective finding. Dr. Hufford testified claimant's physical findings were highly significant. He testified: "[t]he disc herniation, as noted on the MRI, was eccentric to the left. When I performed a right straight leg raise it elicited pain in her left lower back, and to me that is a relative, specific, and significant indicator of the disc herniation."[3]

Dr. Hufford reviewed the task list generated by Doug Lindahl, a certified vocational rehabilitation counselor and job specialist. Of the nine unduplicated tasks on the list, Dr. Hufford opined claimant could perform four of them for a 66.67% task loss.

Mr. Lindahl testified on May 28, 2014. Mr. Lindahl noted claimant had a high school diploma, had a CNA degree from Pratt Community College and was studying health and hospital management (medical records) at Heritage College. Mr. Lindahl knew claimant was unemployed. He noted her work history, even beyond five years prior to her injury, included work as a nurse aide, housekeeper and fast food worker. Based on claimant having light duty restrictions from Dr. Hufford, Mr. Lindahl opined claimant could perform work as a fast food worker, cafeteria assistant, tap room attendant and waitress.

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[3] Hufford Depo. at 7.

Mr. Lindahl identified 129 fast food worker jobs within 25 miles of claimant's Andover residence, no cafeteria attendant jobs and cafeteria jobs that were inappropriate for claimant's restrictions. He found 32 restaurant server positions, some of which offered some degree of fringe benefits, while others were part-time only.

Based upon Dr. Hufford's restrictions, Mr. Lindahl opined claimant had the earning capacity of $8.06 per hour or $322.40 for a 40-hour work week. However, he noted claimant's potential post-injury jobs would have employer-provided fringe benefits at the same percentage of earnings as her pre-injury job provided. For instance, Mr. Lindahl testified that if claimant's job for respondent paid fringe benefits amounting to 10% of her wage, her potential post-injury jobs would also provide a similar percentage of fringe benefits based on post-injury wages. However, he acknowledged there is a wide range of employer-provided fringe benefits and for purposes of his calculation of wage loss, he did not consider fringe benefits for claimant's job with respondent or fringe benefits in any potential post-injury position. He assumed the employer-provided fringes in pre- and post-injury employment would be a "wash."[4] Mr. Lindahl also did not consider pre- or post-injury overtime earnings in assessing wage loss, opting to look at claimant's hourly figures only.

Relevant to this appeal, the Award concluded:

- claimant's pre-injury average weekly wage without fringe benefits was $500, but it increased to $681.37 when her fringe benefits were discontinued on December 31, 2013;

- claimant had a 66.67% task loss;

- claimant had a 36% wage loss based on Mr. Lindahl's opinion she could earn $322.40 per week as compared to her pre-injury average weekly wage of $500 and pre- and post-injury fringe benefits would not be a factor because they were approximately equal;

- claimant, who was credible and looked for work without success, actually demonstrated a post-injury wage earning ability of $0 because she was not earning wages; and

- as noted above, the judge averaged claimant's 100% loss of earning capacity with Mr. Lindahl's opinion of a 36% loss of earning capacity to find claimant had a 68% wage loss for a resulting 67% work disability.

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[4] Lindahl Depo. at 20. Adapting Mr. Lindahl's testimony to the facts, respondent paid $181.37 for fringe benefits above claimant's $500 average weekly wage, a 36.27% difference. Adding a 36.27% increase for post-injury earnings of $322.40 results in an increased post-injury wage of $439.33.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-510e(a) states in part:

> In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.
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> . . .
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> (2)(c) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> . . .
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> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
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> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.
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> . . .

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

. . .

(F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66⅔%; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(c), whichever is applicable.

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

> The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

K.S.A. 2012 Supp. 44-510f states in part:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
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> . . .
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> (3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $130,000 for an injury;
> . . . .

"Open labor market" is not defined under the 2011 amendments to the Kansas Workers Compensation Act. However, under K.S.A. 1991 Supp. 44-510e(a):

> 2. The "open labor market" means that group of jobs (1) in which employment opportunities routinely occur; (2) that are offered by several employers in an economic area; and (3) that are the types of jobs for which a worker seeking employment with the claimant's education, training, experience, and physical limitations would logically offer his or her services.
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> 3. "Open labor market" means only that type of work or services a worker is offering which are generally performed in the geographic area in which the worker is offering them. The open labor market must be reasonably accessible, and workers are not required to move their residences or travel unreasonable distances to obtain such employment.[5]

K.S.A. 2012 Supp. 44-551(i)(1) states, in part:

> [T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

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[5] *Scharfe v. Kansas State Univ.*, 18 Kan. App. 2d 103, Syl. ¶¶ 2 & 3, 848 P.2d 994, *rev. denied* 252 Kan. 1093 (1992).

K.S.A. 2012 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The review by the Board of a judge's order is de novo on the record.[6] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[7] The Board makes its own factual findings on de novo review.[8]

"It is the function of the district court to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."[9] From July 1, 1993 forward, the Board has assumed the role of the district court.[10]

ANALYSIS

Claimant has the post-injury capability to earn $322.40 per week, exclusive of fringe benefits, as based on Mr. Lindahl's testimony, which is not controverted by another vocational expert. Using claimant's $500 average weekly wage before her termination, she has a 36% wage loss. Mr. Lindahl also testified claimant's post-injury fringe benefits would be at a similar percentage of what respondent paid for claimant's pre-injury fringe benefits in relation to her overall pay, such that consideration of pre- and post-injury fringe benefits would be a "wash." Utilizing Mr. Lindahl's testimony, claimant has the post-injury capability to earn $439.33 inclusive of post-injury fringe benefits, which still results in a 36% wage loss.

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[6] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[7] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[8] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 169 P.3d 1147 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[9] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[10] See *Hall v. Roadway Express, Inc.*, 19 Kan. App. 2d 935, 939, 878 P.2d 846 (1994); see also *Riedmiller v. Harness*, 29 Kan. App. 2d 941, 34 P.3d 474 (2001).

Mr. Lindahl's testimony and report regarding claimant's post-injury wage earning capability is the most persuasive evidence. Mr. Lindahl considered specific factors listed in K.S.A. 2012 Supp. 44-510e(a)(E), including claimant's age (then 29), her physical capabilities (light duty restrictions), her education and training (high school diploma, CNA degree from Pratt Community College and that she was studying health and hospital management at Heritage College), prior experience (he considered all of her jobs, including jobs performed more than five years earlier than her date of injury), and availability of jobs in the open labor market (while he knew she was unemployed, he identified over 150 potential jobs within her restrictions).

Claimant's testimony that she is unemployed and has not found a job does not necessarily reflect her "capability" to earn wages. Consideration of claimant's post-injury actual wage loss of 100% may be relevant, in the sense that K.S.A. 2012 Supp. 44-510e(a)(E) requires consideration of "all factors." However, Mr. Lindahl's report and testimony most accurately reflect claimant's post-injury wage earning capability. Claimant's testimony reflects her actual wage loss, not her capability to earn wages. Claimant has a 36% wage loss and a resulting 51.34% work disability. Again, the Board finds Mr. Lindahl's testimony the most persuasive regarding claimant's post-injury wage earning capacity.

As a brief aside, the Board is not concluding the open labor market is limited to within 25 miles of a claimant's residence.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board modifies the July 7, 2014 Award to reflect that claimant has a 36% wage loss and a 51.34% work disability.

The claimant is entitled to 31.72 weeks of temporary total disability compensation at the rate of $333.35 per week or $10,573.86 followed by 21.14 weeks of permanent partial disability compensation at the rate of $333.35 per week or $7,047.02 for a 10% work disability followed by permanent partial disability compensation at the rate of $454.27 per week not to exceed $100,906.74 for a 51.34% work disability.

As of October 27, 2014 there would be due and owing to the claimant 31.72 weeks of temporary total disability compensation at the rate of $333.35 per week in the sum of $10,573.86 plus 21.14 weeks of permanent partial disability compensation at the rate of $333.35 per week in the sum of $7,047.02 plus 42.86 weeks of permanent partial disability compensation at the rate of $454.27 per week in the sum of $19,470.01 for a total due and owing of $37,090.89, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $63,815.85 shall be paid at the rate of $454.27 per week until fully paid or until further order from the Director.

AWARD

WHEREFORE, the Board modifies the July 7, 2014 Award as listed above in the "Conclusions" section.

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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